

No. 15391

IN THE
**United States
Court of Appeals
For the Ninth Circuit**

BENJAMIN B. HOFFMAN,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S REPLY BRIEF

Appeal from the United States District Court,
District of Arizona

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I. Nature of Case

Defendant's¹ statement of the *Nature of Case*, set out on Pages 1 and 2 of Appellant's Opening Brief is correct (A-1 and 2).²

II. BASIS of Jurisdiction:

The U. S. District Court had jurisdiction pursuant to Title 18 U.S.C., Section 3231, and this Court has jurisdiction under Title 28 U.S.C., Section 1291.

III. Statement of the Case:

For the convenience of the Court, Plaintiff¹ has included Schedule No. 1 in the *Appendix*. Schedule No. 1 is a summary showing each Count of the Indictment, the violation charged, the party defrauded, the date of the violation and the foodstuff sent to the Defendant.

STATEMENT OF FACTS

It is obvious in the first paragraph of (A-5), under subdivision, *The Facts*, that the Defendant has little liking for the Plaintiff's case. "The facts given in the light most favorable to the Government . . ." (A-5) as presented by the Defendant, would and should bring about a reversal of this case and a fulfillment of Defendant's greatest expectations.

Examining the statement of the Defendant, with a few added words by Plaintiff, will place the facts ". . . in a light more favorable to the Government . . ." In (A-5) first sentence, first paragraph, Defendant says:

"The facts given in a light more favorable to the Government show that the Defendant ordered merchandise by telephone from various persons and companies named in the 'wire' counts; that he received nearly all of the merchandise so ordered and did not pay for same."

With the addition of a few words, italicized, this statement is, in Plaintiff's opinion of the evidence, much more accurate, to-wit:

The facts given in a light more favorable to the Government show that the Defendant *operating out of phony business offices* ordered merchandise by telephone from various persons and companies named

1. Appellee is designated herein both as "Plaintiff" and "Appellee" and Appellant is designated as "Defendant" and "Appellant."

2. Hereafter the letter "A" followed by a dash and a number or series of numbers enclosed in parentheses will refer to Appellant's opening brief and the page number therein.

in the "wire" counts, intending at the time of the telephone call not to pay for the merchandise ordered; that he received nearly all of the merchandise so ordered and did not pay for the same; that all orders made by telephone by the Defendant and described in the "wire" counts, were made as the part of a scheme on the part of the Defendant to defraud the various persons and companies named in the "wire" counts, to obtain the ordered merchandise by false pretenses.

The preceding statement of facts would be the facts most favorable to Plaintiff. The "mail" count facts would be substantially the same as the "wire" count facts, except, that they would recite the "use of the mails for the purpose of executing Defendant's scheme to defraud."³

In several recent cases⁴ this Court has held that where there are several counts in an indictment or information and identical concurrent sentences were imposed, and the sentence did not exceed the maximum sentence which could have been imposed under each count on which the Defendant was convicted, that the judgment will not be reversed if any one count is free from the error. The U. S. Supreme Court has ruled likewise.⁵

It is Plaintiff's belief that all of the Counts upon which the Jury returned a guilty verdict against the Defendant are substantially proven as alleged in the indictment. In order to conserve time and space, Appellee has selected Count XI to make a detailed statement of fact.

Ted R. Brice, Manager, of the T. L. Brice Company, located in Sherman, Texas, (T-121) received a collect telephone call from Tucson, Arizona, on May 25, 1953

³. U.S. vs. Mercer, (Cal.), 133 Fed. Supp. 288.

⁴. Cohen vs. United States, (C.C.A. 9, 1953) 201 F. 2d 386.
Paquet vs. United States, (C.C.A. 9, 1956) 236 F. 2d 203.

⁵. Pinkerton vs. United States, 328 U.S. 640, 641-642.

(T-122; Plaintiff's Exhibit 14)⁶ from the Defendant, who represented himself as Ben B. Hoffman, Wholesale Grocery, Tucson, Arizona.⁷

The Defendant inquired of Mr. Brice whether Brice had pickles for sale, the price of his pickles, and the delivery date of purchases (T-123). During this telephone conversation, the Defendant made several representations and pretenses to Mr. Brice that were false and fraudulent and calculated to obtain Brice Pickles without payment, to-wit: (1) That he was Ben B. Hoffman, Ben B. Hoffman Wholesale Grocery (T-122); (2) That he wanted to purchase pickles (T-123); (3) That the terms of payment were satisfactory, "one percent 10, net eleven" (T-123). Another false pretense was represented by Defendant to Mr. Brice in a later telephone call, prior to shipment by Mr. Brice, when Defendant represented that he was the one purchasing the James A. Dick Grocery Company, Tucson, Arizona (T-124), when such was not the fact (T-198). This representation was made by Defendant upon inquiry by Mr. Brice into the Defendant's credit (T-124) standing.

Mr. Brice, relying upon the representations of the Defendant caused the pickles listed on the invoice and bill of lading (Plaintiff's Exhibits 13 and 15) to be shipped on June 4, 1953 (Plaintiff's Exhibit 13) by his own truck from the Brice Plant at Sherman, Texas (T-123), to Tucson, Arizona (T-125), on open account (T-133). This shipment consisted of 775 cases of assorted Brice Pickles at a cost to the Defendant of \$2,138.75 (T-125; Plaintiff's Exhibits 13 and 15).

6. Hereafter the letter "T" followed by a dash followed by a number or series of numbers enclosed in parentheses will refer to the Transcript of Record and the page number or numbers therein.

7. In the Transcript of Record, pages beginning with 126 through 131 are out of sequence. The true chronological order of testimony and evidence can only be reviewed in the original Transcript of Proceedings, filed herein.

Defendant received this shipment in Tucson, Arizona, on June 6, 1953, and he signed receipt for the goods upon the invoice presented to him by the Brice truck driver (T-123; Plaintiff's Exhibits 13 and 15). This signature of the Defendant upon the invoice (Plaintiff's Exhibit 13) was found to be the same signature, written by the same person, as known identified signature specimens of the Defendant introduced into evidence earlier in the trial (T-80 and 81; Plaintiff's Exhibits 8K, 8L, 8M, 8N, 8P, 8Q, 8S, 8T).

Upon Defendant's direction the merchandise was stored in the warehouse of the Tucson Transfer Co., Tucson, Arizona (Plaintiff's Exhibits 26 and 26A-26D).

Within just five days after the receipt of these goods the Defendant succeeded in selling 690 cases of Assorted Brice Pickles to Rouland Goodman, Goodman's Market, Tucson, Arizona, for \$1,083.75 (T-192 through 196; Plaintiff's Exhibits 26 and 26A-26D). This sale represents a loss of \$759.75 on the invoice price to the Defendant (Plaintiff's Exhibits 13 and 15). Schedule No. 2, Appendix, graphically sets out this loss.

Mr. Goodman testified that he carefully examined the pickles because "the price was kind of below normal" (T-197) and that he determined the merchandise to be first-class (T-197); that he purchased the 690 cases (T-195) of Brice Pickles (T-197) and paid for them by his check No. 2488, dated June 12, 1953 (Plaintiff's Exhibit 26-d). This check has the endorsement of Ben B. Hoffman on it. It was found that this signature was written by the same person, the Defendant, who signed Plaintiff's Exhibit 13.

After delivery of the merchandise to the Defendant, and the Defendant's sale of the goods at a \$759.75

loss, Mr. Brice attempted to collect on the open account. He telephoned the Defendant, prepaid, (T-129; Plaintiff's Exhibit 14) demanding payment as agreed upon (T-123). Brice testified, "... we told him to either send the money from the invoice, or we would turn it over to our attorney for collection, or pick up the merchandise" (T-126). Defendant said that a check would be in the mail that evening (T-126). In a day or so after this call Mr. Brice received a check in the amount of \$400.00 from the Defendant (T-126). After receipt of the check, Brice again attempted to collect the balance due on the invoice price (T-130) by prepaid telephone calls to the Defendant (T-130; Plaintiff's Exhibit 14). In the last phone call, Brice told the Defendant, "... if it was not paid we would come out and pick up the merchandise and issue a credit for merchandise we picked up . . ." (T-130). "He(Defendant) said they (merchandise) were distributed over a several hundred mile area, and he couldn't pick them up there, and he would mail a check, I think that night, or very shortly, mail another check very shortly, and at that time we gave him so many hours to mail another check in, which did not come in. Q. That check never came in? A. That is right." (T-130). The jury found that this maneuvering by the Defendant constituted "lulling" procedures designed to keep Brice from understanding the true situation regarding his account, his merchandise, and the scheme of the Defendant, to which he had become a victim.

The facts, in addition to the foregoing, showed that Ben B. Hoffman, doing business as Ben B. Hoffman Wholesale Grocery, Tucson, Arizona, as a phoney business front. It was shown that at his place of business, when Mr. Goodman visited it, he had \$150.00 worth of merchandise therein (T-200). Mr. John E. Doyle's, a

retired railroader, testimony clearly shows how the scheme of the Defendant operated (T-200 through T-214). His recital of the Defendant's telephone procedure is corroborated by Henry Leppla (T-137 through 145), Mrs. Darling (T-40 through 42), John L. Glass (T-365) and W. C. Hayward (T-332 through 350). Doyle was an employee of the Defendant, worked for him a week for \$5.00, and lived across the street from the Defendant's business (T-201). He was hired as a janitor and to answer the telephone (T-202). There were no files, books or records in the office (T-202). The only employee was Doyle (T-203). No salesman (T-204), nobody came in. He overheard a whole truck-load of pickles ordered (T-206). Doyle's description of this office and its procedures is corroborated by the testimony of Henry Leppla (T-137 through 145), William W. Pritchett (T-93 through 99), Nadine Cram (T-99 through 102), George Renner (T-89 through 92), Lynn Bedford (T-184 through 191).

IV. ARGUMENT

In answering Appellant's argument we will discuss the Specifications of Error in the order in which they are presented in Appellant's Brief.

SPECIFICATION OF ERROR NO. I (A-10)

The Indictment does not state facts sufficient to constitute an offense against the United States.

It has long been settled in federal jurisdiction that an indictment is good if (1) it states facts sufficient to inform the defendant of the ~~offense~~ with which he is charged, and (2) if its averments be sufficiently certain to safeguard the accused from a second prosecution for the same act.

Todorow vs. United States, (C.C.A. 9th) 173 F. 2d 439, 447

United States vs. Bickford, (C.C.A. 9th) 168 F. 2d 26, 27

Hagner vs. United States, 285 U.S. 427

In the *Hagner* case, *supra*, at page 433, the Court said, "... it is enough that the necessary facts appear in any form, or by their fair construction can be found within the terms of the indictment."

Plaintiff submits that the Indictment returned against the Defendant (T-3 through 10) stands the acid test of this court's close inspection.

To illustrate the sufficiency of the Indictment, Plaintiff will use Count I (T-3, 4 and 5). There are several points of law that must be kept in mind when examining this Count. (1) Case law applicable to "mail fraud" 18 U.S.C., Section 1341, is also applicable to "wire fraud" violations under 18 U.S.C., Section 1343.⁵ (2) The "gist" of the offense of "mail fraud" (wire fraud) is not the scheme to defraud, but it is the use or attempted use of the mails (wire) in the execution of the scheme.

Kreuter vs. United States, 218 F. 2d 532, (certiorari denied 349 U.S. 932)

72 C.J.S., Post Office, Section 49(b)

Hartzell vs. United States, 72 F. 2d 569

(3) The elements of the offense are: (a) Scheme to defraud, and (b) use of the mails (wire).

Webb vs. United States, 191 F. 2d 512

72 C.J.S., Post Office, Section 49(c)

Count I consists of two paragraphs. The first paragraph sets out the scheme of the Defendant invented by him on or about the 29th day of May, 1953, and in effect sets out the first element of the offense-scheme to defraud. The second paragraph actually sets forth the gist of the offense (interstate wire, T-5), states facts sufficient to inform the Defendant of the offense with which he is charged, and avers facts sufficiently certain to safeguard Defendant from a second prosecution. This constitutes the second element of the offense-use of interstate wire.

Let us examine the allegations of paragraph 2: (a) In the furtherance of the scheme in paragraph 1, Defendant made fraudulent representations and promises as set out in paragraph 1, (b) on November 23, 1954, (c) in the Arizona District, (d) for the purpose of executing the scheme in paragraph 1, (e) did by interstate wire, (f) telephone Long's Date Gardens in Pasadena, California, (g) and place an order for food products, viz., dates, (h) to be delivered to the Acme Distributing Company, Tempe, Arizona.

Can it seriously be contended that the Defendant could not successfully defend himself against an indictment in, say, the Southern District of California, in a few years, if the Grand Jury there would indict him for the violation set out in Count I? Plaintiff believes it cannot be seriously contended.

If there is any question at all in Count I, or the other Counts, it was cured by the Bill of Particulars (T-13, 14, 15 and 16). On T-15, the Bill set out the persons who received the telephone calls from the Defendant, to-wit:

“Long Date Gardens
2600 East Foothill

Pasadena, California

Item: Dates

Person phoned: Mrs. Lola M. Darling"

Testimony, as to telephone conversations with the Defendant, at the trial was limited, by the Court, to those persons described in the Bill of Particulars.

Plaintiff will now answer each of the subdivisions set out by the Appellant in Specification of Error No. I, to-wit:

(a) *The scheme to defraud, as alleged, is not a continuing scheme.*

Answer: Appellant's best argument in his brief on this subject, appears to be that because the Grand Jury of the District of Arizona did not use the Official Mail Fraud Form, Title 18 U.S.C.A., 612, that the Indictment did not allege a continuing scheme to defraud. We agree with the Appellant (A-12) that if this is so, all Counts of the Indictment should have been dismissed, except Count XI.

We have great faith in the Official Forms and use them extensively. One glance at the Indictment will plainly show that, in the main, the Official Form served as the basis for drawing the Indictment. We do not believe, however, that the Official Forms constitute "the minimum requirements" in charging the offense that they were drafted to charge. This Court held in the case of *Ochoa vs. United States*, (C.C.A. 9th) 167 F. 2d 341, 345, that although the statutory crime of Murder in the First Degree required Malice, that the Official Form not charging Malice was not defective because "the form employed can be considered to include all the essential facts constituting the offense... and it was prescribed by the Supreme Court, which we must necessarily assume was cognizant of

the requirements of the law." This was not a "minimum requirement" but an example of the harmony and spirit and intent of 18 U.S.C.A., Rule 7(c).

Appellee contends that plain English dictates that when something is done "for the purpose of executing the aforesaid scheme and artifice" (T-4 and 5, Count I, 2nd paragraph) that said scheme is not completed and that in each and every Count the Indictment alleges a continuing scheme. We know that this contention is within the spirit, intent and hope of Rule 7(c), 18 U.S.C.A.

Appellee has no quarrel with the cases cited by the Appellant on A-12, through A-20, except that they are not applicable in this case. Their holdings have been complied with both in the Indictment and in the Trial of the Case.

(b) *The scheme is not charged with sufficient particularity to enable the Defendant to know the charge against him by direct and positive averments and not inferentially.*

Answer: This argument is set out, heretofore, following paragraph IV entitled: *Argument*, subparagraph entitled: *Specification of Error No. I.*

(c) *That said scheme alleged by the Government shows nothing more than transaction on credit.*

Answer: This was the same argument used by Counsel in his closing argument to the jury. They did not believe it then and Appellee does not believe it now. Mail Fraud Cases are replete with similar examples of transactions on credit. This was a question of fact and the jury determined that the Defendant never intended to pay for the merchandise he ordered.

The additional complaints of the Appellant, following subparagraph (c) are misleading, as a Bill of Particulars (T-13 through 16) was filed in this action.

SPECIFICATION OF ERROR NO. II (A-21)

The verdict on the "wire" counts is unsupported by evidence.

The Defendant would be in a strong position if his argument: that the Plaintiff must prove each misrepresentation set out in the Indictment beyond a reasonable doubt is taken seriously. This we feel is not, however, the law.

We believe the law is that the Plaintiff is not required to make proof of every allegation of the scheme contained in the Indictment, and that the Plaintiff has succeeded in proof when he has established the scheme substantially as set out in the Indictment.

Shreve vs. United States, (C.C.A. 9th) 103 F. 2d 796, Note 30, page 812

Graham vs. United States, (C.C.A. 10th) 120 F. 2d 543, 546

Rude vs. United States, 74 F. 2d 673, 677

We have substantially proven the false pretenses and misrepresentations of the Defendant and the Transcript of Record bears this out.

There are several false pretenses or false representations, used or made by the Defendant that run to all of the Counts in the Indictment. They are:

- (1) That he was Acme Distributing Company of Tempe and Mesa and Ben B. Hoffman, Ben B. Hoffman Wholesale Grocery. These pretenses were false and fraudulent because these business fronts constituted phoney companies. See the testimony of Bedford (T-184), Cram (T-99), Doyle (T-200), Goodman (T-192), Hirsch (T-85), Leppla (T-137), McRuer (T-74), Pritchett (T-93).

- (2) That he wanted to purchase foodstuffs ordered. This pretense was false because at the time he ordered the goods he intended not to pay for the merchandise.
- (3) That he was a wholesale dealer in foodstuffs. This pretense was false for the same reason as (1) herein.
- (4) That he had the ability to pay for the goods shipped to him. This pretense was false as he had a bad credit rating and no visible assets (T-222, and the testimony of the witnesses set out in (1) herein).
- (5) That he would make payment on the account pursuant to the custom of the trade. This pretense was false because he did not intend to pay for the goods when he ordered them.

The Court in instructing the jury gave an instruction which Plaintiff feels represents the law in this type of "mail-wire fraud" case (T-381). This instruction, hereafter set out in full, was not objected to by the Defendant and represents a clear statement from the case *Roper vs. United States*, 54 F. 2d 845, 847. The instruction goes to every Count in the Indictment, to-wit:

"COURT'S INSTRUCTIONS TO THE JURY

* * * *

"You are instructed that the phrase 'false and fraudulent pretenses, representations and promises' as charged in the indictment means untrue and false words and conduct which are calculated to deceive and to induce action which would not be taken if the truth were known by the person (409) deceived.

"If you find beyond a reasonable doubt that the defendant did in fact order the products set forth in the indictment, I instruct you that this constituted a promise and representation that the defendant in-

tended to pay for the products ordered, but for such representation and promise to be considered false you must further find beyond a reasonable doubt that the defendant at the time he ordered the goods had no intention of paying for the products ordered."

With the above facts in mind, Appellee will now examine each of the Defendant's Arguments, Count by Count, to-wit:

Count I: In addition to the false pretenses set out heretofore, the testimony of Mrs. Darling (A-22 and 23) shows clearly that she was "taken in" by a real "con" artist. His technique was good enough that Mrs. Darling lost \$16,725.00 (T-49).

It is Defendant's right to pick testimony most beneficial to his position, but it is misleading. Pages 40 and 41, *Transcript of Record*, show additional conversation between Defendant and Mrs. Darling as follows:

"Q. (by Mr. Eubank) : What did this individual say that called you ?

A. The party that called, that identified me as Mrs. Long, they asked me if I had any dates to sell, of which I told him I did. And then they told me the amount they would want, and we agreed on a price, just by telephone only.

Q. Do you recall the amount that they wanted, approximately ?

A. I think the first order he wanted 600 boxes of three and five-pound sizes.

Q. And what was the price you quoted him ?

A. I quoted 45 cents a pound f.o.b. Pasadena."

The entire testimony of Mrs. Darling (Long) is the basis for the jury's verdict of guilty on Counts I and III of the Indictment, not merely the part quoted by the Appellant.

Count II: This Count is substantiated by the very testimony the Defendant has chosen to illustrate that

it is not sufficient. It contains false representations and false pretenses that the jury found were false, among which are the following:

- (a) "This is the Acme Distributing Co., Ben Hoffman, speaking."
- (b) "Johnnie, you must remember me. I met you about a year ago down in the market."
- (c) "Some of *my* boys this time of year have been getting calls for California Dates . . ."

This testimony coupled with the general false pretenses set out heretofore, creates substantial evidence as required for conviction.

Count IV: By the very terms of the testimony of Mr. Ehlinger (A-27), cited by the Appellant, you must look to the exhibits in evidence and further testimony in the *Transcript of Record, to find the terms agreed upon, representations and pretenses made*, for this sale was made through a series of telephone calls, letters, and Western Union telegrams. In this Count, as in the others, Defendant held himself out as a respectable wholesale grocery, Acme Distributing Company, Tempe, Arizona, interested in sea products (A-26 and 27). See the testimony between the Defendant and Mr. Ehlinger that resulted in shipments (T-267 through 283 and Plaintiff's Exhibits 39, 40 and 41, 41A through 41D).

Counts V, VII, X: In these Counts like the others, heretofore discussed, the Defendant has failed to carry his burden of proving the insufficiency of the evidence. He has lifted out of context a segment of the testimony in evidence and says, in effect, "see this part of the testimony does not contain all of the false pretenses and misrepresentations set out in the Indictment." Plaintiff submits that the burden should be upon the Appellant to clearly show insufficiency of the evidence.

Harris vs. United States, (C.C.A. 9th) 48 F. 2d 771, 777

a. In Count V (A-29) Defendant agreed to pay on arrival, but he never paid.

b. In Count VII (A-29) Defendant and Kelly established the terms of sale by conversation over interstate wire and by letters exchanged through the U. S. Mails. The false pretenses under this Count are those set out heretofore.

c. In Count X, using just the small parts of testimony given in evidence by Mr. Hayward, and used by Appellant in his brief (A-31 and 32), several false pretenses and misrepresentations appear in even that short space, to-wit:

- (1) Hoffman represented he was a wholesaler entitled to 5% price reduction.
- (2) Terms were 1%, 10 days, which Defendant did not intend to pay.
- (3) "He said he discounted all of his bills, and I needn't worry about the payment of them."

Additional false pretenses and misrepresentations on the part of the Defendant appear in the full transcript (T-332 through 350). On page 336, *Transcript of Record*, appears the following misrepresentation of credit:

"Q. (by Mr. Eubank): Now, in regard to that first telephone call, what did Mr. Hoffman tell you about his business, or did you inquire about his business in Tucson?

A. Yes, I inquired about his business in order to give him the correct price. He said he was the largest wholesale dealer in Tucson."

d. Count XI is exhaustively covered in the *Statement of Facts*, herein.

Conclusion: (a) The burden of showing insufficiency of the evidence to justify the verdict in this action is upon the Appellant.

Harris vs. United States, (C.C.A. 9th) 48 F. 2d 771, 777

(b) There is authority that the Ninth Circuit Court of Appeals will indulge all reasonable presumptions in support of the trial court's rulings and draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, the Court will consider the evidence most favorable to the Appellee.

Henderson vs. United States, (C.C.A. 9th) 143 F. 2d 681, 682

Pasadena Research Laboratories, et al. vs. United States, (C.C.A. 9th) 169 F. 2d 375, 380

(c) When Appellant contends evidence is insufficient to support the verdict, the contention calls for an examination of the basic facts as the jury could have found them from the evidence if every conflict in testimony had been resolved in favor of the Appellee.

Todorow vs. United States, (C.C.A. 9th) 173 F. 2d 439, 442

It is obvious from the aforementioned authorities that the Appellant has failed to carry the burden of demonstrating insufficiency of the evidence. One glance at the Statement of Facts (A-5) illustrates just how lightly this burden is carried. A reading of the evidence in any count proven in this case, would result in more "basic facts" than the Appellant has seen fit to point out to the Court.

There is sufficient evidence to sustain all of the "wire" Counts of the Indictment.

SPECIFICATION OF ERROR NO. III (A-36)

"The Verdict on the Mail Counts is unsupported by evidence."

Appellee will reply to the Appellant's claims of error by answering each subdivision claim.

A. "(a) The evidence was insufficient to submit to the jury the question beyond a reasonable doubt as to whether said mailings were made, or if made, were in furtherance of the scheme to defraud where the evidence clearly shows that the Government failed to prove the scheme as alleged, or at all, and therefore, such use of the mails could not be in furtherance of a scheme to defraud."

Answer: In support of Count VIII, Appellee placed in evidence Plaintiff's Exhibits 29 and 30. Those exhibits represent two letters, 29 from Kelley to Hoffman, and 30 from Hoffman to Kelly. The stationery, Exhibit 30, was compared by the jury with Plaintiff's Exhibit 26-D (T-196) and found to be the same. The signature of the Defendant on Exhibit 30 was compared with his identified signature, Plaintiff's Exhibits 8-N, 8-O, etc. set out in *Transcript Record*, pages 80 and 81, and the jury found they were written by the same person. Government's Exhibit 30 is addressed to "Post Office Box 174." Kelley testified to the question of whether or not he opened the letter himself. "A. Well, I rather think so. If I am away, the mail is opened by my bookkeeper. If I am there, I open all the mail, and to the best of knowledge I opened that letter. Q. But you are not sure? A. Well, I am not definitely sure, no." The jury found that he opened the letter.

In support of Count IX, the fact of receipt of the letter, Plaintiff's Exhibit 52, is proven by the stationery and signature, as set out above in the discussion on Count VIII, and the telephone conversations between Hayward and the Defendant, both before and after the

letter was received by Haywood. (T-336 through 343). Plaintiff's Exhibit 51 establishes the dates of the phone calls to Hayward from the Defendant and the telephone calls subsequent to receipt of the letter from the Defendant.

The testimony of Hayward (T-338) requested the Defendant to confirm the order (T-336 and T-337) in writing. The date of the first telephone call collect from Tucson, August 10, (Plaintiff's Exhibit 51) the date of the letter, the testimony of Hayward (T-340 and 341) satisfied the jury, together with the other facts that the U. S. Mails had been used.

In support of Count III, we have in evidence the testimony of Mrs. Darling (Long) (T-57) "... I told them if they didn't send the money, I wouldn't make another shipment, and they said it would be in the mail." She testified she received the check (Plaintiff's Exhibit 5) enclosed in Plaintiff's Exhibit 4 (envelope). The jury found that the envelope was sent by Hoffman to Mrs. Darling and this is confirmed by the return address on Plaintiff's Exhibit 4. On the face of the check (Plaintiff's Exhibit 5) the name Acme Distributing Company appears.

The strong argument of Appellant relating to the "lulling" effect of this letter results from the cross-examination of Mrs. Darling (Long) *Transcript of Record*, 67 through 71. Her testimony was that she did not ship the final shipment until she received the \$500.00 cashier's check from the Defendant. Defendant's attorney showed that the check was dated on December 12, 1954 and the air mail envelope post-marked December 13, 1954. Defendant's attorney then asked her if she was not mistaken, having shipped the order before receiving the check, she said that she was

sure she did not ship before receiving the check. The jury believed her.

Consequently, in this Count the mailing is conclusively proven beyond any doubt.

B. "(b) because if there was a scheme, it was consummated prior to the time the letters were mailed."

Answer: There is no evidence to support this contention of the Appellant.

Counts VIII and IX could not have been consummated as the receipt of the letters, therein, was essential to negotiations and the subsequent shipment of merchandise to the Defendant. See the discussion, subparagraph A, Specification of Error No. 3, heretofore set out.

Count III is fully discussed in subparagraph A, Specification of Error No. 3, heretofore set out.

The jury found from all the facts in evidence that a scheme did exist. The Appellant has failed to show otherwise.

C. "(c) because the entire evidence shows that the transactions were credit transactions and the placing of orders for goods in and of itself does not constitute the promises and representations charged in each Count of the Indictment."

Answer: When this theory was presented to the Court for Instructions, the Appellant made no objection (T-381). In fact, the Appellant checked the case to see if it held the law as the Appellee represented it. Upon satisfying himself of this fact, he did not object to the instruction. The case is *Roper vs. United States*, 54 F 2d 845, 847.

Upon reading the *Transcript of Record*, and the case, *State of Arizona vs. Ben Hoffman*, 78 Arizona 319, you can easily ascertain the great wisdom of the rule

of law in the *Roper* case. All the evidence of all these witnesses leads to only one conclusion, and that is that the Defendant, in every waking moment, was himself a false pretense and a misrepresentation of fact.

These were not credit transactions. The Defendant intended to obtain goods without the necessity of paying for them. This lowers business costs and reduces overhead expenses.

D. "(d) because the matter mailed did not contain any representation whatsoever."

Answer: In answer to this point, I will quote the Appellant on page 30 of his Opening Brief, where he says:

"We realize that the letter may be ever so innocent, but if it is sent in furtherance of a scheme to defraud, an offense is committed."

This is a correct statement of the law, and the jury found that the letters sent in Counts III, VIII and IX were in furtherance of the scheme to defraud. The letters are discussed more fully under subdivisions A and B, Specification of Error No. 3, heretofore set out.

SPECIFICATION OF ERROR NO. IV (A-40)

"The Court committed prejudicial error in telling the jury that if the Government did not prove its case, he would direct a verdict, thereby leaving the impression that if he did not direct a verdict, the Defendant was Guilty."

This Specification of Error illustrates the weakness of Appellant's appeal. To rely on this statement by Judge Ling as a point of error is ludicrous.

The statement, as Mr. Whitney knows, was directed at the Appellee, and means what it says, that if the

prosecution fails in its proof, the Court will direct a verdict in favor of Defendant.

Any prosecutor that has tried a case before Judge Ling knows full well the meaning of his statement. Many has been the case, with a half proven element that has been terminated by a directed verdict when the Government rested its case.

This was the meaning of Judge Ling's remarks taken in fair construction. The words were used in place of a denial of Mr. Whitney's objection and in the exercise of the Court's discretion as to when a proper foundation for admission of evidence was laid.

If any prejudice did result to the Defendant from this statement at page 40, *Transcript of Record*, it most certainly would not have affected the next day's proceedings and most certainly would not have affected the entire *Transcript of Record* thereafter.

SPECIFICATION OF ERROR NO. V (A-44)

"The Court erred in admitting telephone toll bills in evidence showing a call made in 1953 where the Indictment charged the call to have been made in 1954.

The Appellant states correct facts in his brief (A-42). It was our contention, and the Judge assented to it, that because the Defendant was charged in two counts, IX and X, with a scheme to defraud Hayward (T-334, 335), and was charged with an incorrect date (by one full year) in Count X, but was charged with the correct date in Count IX, that he was sufficiently informed of the offense to prepare his defense and could, after conviction, successfully defend himself on a similar charge under an Indictment alleging the correct date in Count X. It stands to reason, if he prepared his

defense under Count IX, he would have had to prepare his defense under Count X. Of course, he had no defense.

CONCLUSION

Appellee respectfully submits that the Appellant has failed to carry the burden of persuasion in his arguments set out in the several Specifications of Error heretofore discussed. For this reason the Appellee prays that the Honorable Court dismiss the appeal and affirm the Judgment entered by the U. S. District Court, District of Arizona.

Respectfully Submitted,

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Appendix
SCHEDULE NO. 1

Trans- script	Count	*Crime	Against Whom	Date	Food Stuff
T-3	I	A	Long's Date Gardens	11/23/54	Dates
T-5	II	A	C. A. Glass Co.	10/11/54	Dates
T-5	III	B	Long's Date Gardens	12/13/54	Dates
T-6	IV	A	Grant-Whitman Co.	6/14/54	Salmon
T-6	V	A	Shurtz Produce Co.	5/24/54	Poultry
T-7	VI	DISMISSED		DISMISSED	
T-7	VII	A	R. O. Kelly Co.	8/31/53	Peas
T-8	VIII	B	R. O. Kelly Co.	8/24/53	Peas
T-9	IX	B	Hayward's Special	8/13/53	Jam
T-9	X	A	Hayward's Special	8/13/53	Jam
T-10	XI	A	T. L. Brice Co.	5/29/53	Pickles

* Letter A refers to 18 U.S.C., Section 1343 (wire fraud).
 Letter B refers to 18 U.S.C., Section 1341 (mail fraud).
 This would constitute the "gist" of the offense.

SCHEDULE NO. 2
ANALYSIS OF SALE OF BRICE PICKLES
TO GOODMAN'S MARKETS

Description	A. Invoice price	B. Sales price	No. Cases	Loss
Brice Dill Pickles 12/32 pack	\$2.80	\$2.00	245	\$196.00
Brice Kosher Dill Pickles 12/16 pack	\$2.25	\$1.25	295	\$295.00
Brice Sweet Pickles 24/8 pack	\$4.20	\$1.50	50	\$135.00
Brice Sweet Pickles 12/16 pack	\$3.10	\$1.50	25	40.00
Brice Sour Pickles 24/8 pack	\$3.20	\$1.50	25	42.50
Brice Sour Pickles 12/16 pack	\$2.25	\$1.50	25	18.75
Brice Sour Pickles 12/32 pack	\$2.80	\$1.50	25	32.50
			690	\$759.75

A: See Plaintiff's Exhibits 13 and 15.

B: See Plaintiff's Exhibits 26, 26A, 26B, 26C, 26D.

The above tabulation accounts for 690 cases of the 775 case order from the Brice Pickle Company, and reflects sale thereof for \$759.75 less than the invoice price.